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No. 82-163

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

CITY OF CHEROKEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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The Interstate Commerce Commission (ICC) seeks review of the decision of the court of appeals enjoining a railroad from imposing a freight surcharge under a provision of the Staggers Rail Act of 1980, 49 U.S.C. (Supp. IV) 10705a(b)(1)(A), after the Commission had declined to suspend the surcharge, and ordering the Commission to hold a hearing to determine whether the surcharge was lawful under the standards set forth in 49 U.S.C. (Supp. IV) 10705a(b)(2).[1]

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[1] 49 U.S.C. (Supp. IV) 10705a(b)(2) provides:

> A rail carrier may apply a surcharge under this subsection if, prior to the application of such surcharge, that portion of the charges applicable to traffic to and from the line to which the surcharge applies and accruing to the surcharging carrier does not provide such carrier revenues adequate to cover—

1. Illinois Central Gulf Railroad (ICG) operates a 96-mile branch line between Cherokee, Iowa, and Sioux Falls, South Dakota, which it has been attempting to abandon, pursuant to 49 U.S.C. (Supp. IV) 10903, since December 1977 (Pet. App. 2a). The ICC granted the railroad's application, but the Eighth Circuit vacated the order and remanded the matter to the ICC for further proceedings. *City of Cherokee* v. *ICC*, 641 F. 2d 1220, cert. denied, No. 80-2122 (Oct. 13, 1981).

Soon thereafter ICG filed a unilateral tariff surcharge, under 49 U.S.C. (Supp. IV) 10705a(b), for freight on the Cherokee-Sioux Falls line in excess of $1,000 per car, which was more than double the rate previously paid for freight moving on that line (Pet. App. 3a). Shippers immediately filed a protest with the ICC, requesting it to exercise its authority under 49 U.S.C. (Supp. IV) 10705a(g)(3) to reject or suspend the surcharge on the ground that the surcharge was merely an attempt to circumvent the remand order of the court of appeals on the abandonment issue (Pet. App. 3a). The ICC refused this request without explanation (Pet. App. 13a).[2]

2. The court of appeals accepted jurisdiction to review the ICG's unilateral surcharge and enjoined the railroad from implementing the new rate until the Commission conducted a hearing and determined whether the new rate was

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(A) 110 percent of such carrier's variable cost of transporting the traffic involved to or from such line; plus

(B) 100 percent of such carrier's reasonably expected costs of continuing to operate such line, which shall include all costs necessary is sustain service on the line.

[2]The shippers then moved the court of appeals for a stay of the rate pending judicial review, which the court granted (Pet. 6). Justice Blackmun denied ICG's motion for a stay of the court of appeals' action. *Illinois Central Gulf R.R.* v. *City of Cherokee*, No. A-45 (July 24, 1981).

lawful under 49 U.S.C. (Supp. IV) 10705a(b) (Pet. App. 1a-9a). The court based jurisdiction on the All Writs Act, 28 U.S.C. 1651(a),[3] finding that the ICG's action was "intended to interfere with our clear mandate and jurisdiction in the abandonment case" (Pet. App. 4a & n.2). The court concluded, however, that it would be unfair to ICG to forbid it to impose a valid surcharge under the Staggers Rail Act of 1980, even if ICG acted only to avoid the court's prior order. The court of appeals therefore ordered the Commission to conduct a hearing to determine as quickly as possible whether the $1,004 per car charge was consistent with 49 U.S.C. (Supp. IV) 10705a(a)(2)(B)(ii), 10705a(a)(3)(B), and 10705a(b)(3)(C).[4]

3. The Commission's primary claim (Pet. 7-13) is that the decision below conflicts with a line of cases from this Court forbidding courts of appeals to enjoin rates that the ICC has declined to suspend, because such action constitutes an unwarranted interference with the Commission's plenary authority to regulate rates. See, *e.g.*, *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 451 (1979); *United States* v. *SCRAP*, 412 U.S. 669, 690 (1973); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 672 (1963). See also *Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609, 619

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[3]The All Writs Act, 28 U.S.C. 1651(a), provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[4]Section 10705a allows the carrier to adopt surcharges that do not exceed 110% of the variable cost of carrying the traffic on the line and 100% of the reasonably expected cost of continuing the service (Pet. App. 7a). The court of appeals found that the ICC had not adopted a definition of "reasonably expected cost[s]" and therefore it was impossible to determine whether the charges imposed by ICG were proper (*ibid.*). The legality of the surcharge is not, however, an issue before this Court and remains to the examined on remand by the ICC.

(1981). The Commission also argues that reliance by the court of appeals on the All Writs Act to justify the injunction conflicts with the Fifth Circuit's decision in *Mississippi Public Service Commission* v. *ICC*, 662 F. 2d 314 (1981). See also cases cited at Pet. 10 n.10.

The United States has not joined the Commission's petition because, in our view, the decision rests on an unusual factual record that distinguishes this case from those cited by the Commission and limits the significance of the court of appeals' ruling. Since the situation is most unlikely to recur, the decision below does not appear to warrant review by this Court.

Crucial to the decision in this case is the uncontested finding of the court below that the railroad's action was a direct attempt to undermine the mandate of the court of appeals in the abandonment proceeding (Pet. App. 4a). The court of appeals' decision is thus not primarily an attempt to interfere with the ICC's plenary authority over rates, but is instead an effort to protect the integrity of the court's prior order. Indeed, the court of appeals expressly limited its decision to the situation where the carrier acts in apparent defiance of a prior court order. The court of appeals thus concluded that this Court's prior decisions did not compel judicial inaction in this unusual situation (Pet. App. 4a).[5]

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[5]The Fifth Circuits's decision in *Mississippi Public Service Commission* v. *ICC*, *supra*, is also inapposite. The court in that case recognized the possibility that the All Writs Act might provide a court with discretion to suspend a rate in a proper case, but held that an injunction was not warranted when all that had occurred was the imposition of a surcharge and a refusal by the ICC to suspend it. The absence of a prior court order clearly distinguishes that decision.

Although the ICC is correct (Pet. 12 n.12) in asserting that the All Writs Act extends to cases where an appeal is not pending, *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 603 (1966), it does not follow that the "considerations" in the *Mississippi Public Service Commission* case and this one "are the same" (Pet. 12 n.12). Merely because the Act might

Although we are not convinced that the court of appeals was correct in concluding that the All Writs Act allows a court to enjoin a rate, even when it is in derogation of a prior court order,[6] the issue is not controlled by prior decisions of this or any other court.

Moreover, the situation giving rise to this decision is most unlikely to be repeated. The prior decision vacating the abandonment order is fairly uncommon because of the limited scope of review that courts of appeals have in such matters.[7] Also, the size of the surcharge imposed by ICG is relatively high—larger than any cited by the Commission and much larger than most (Pet. 13 n.13)—and its timing is peculiarly suspect, as the court of appeals explained. A decision that is the product of such a confluence of unusual events does not appear to be worthy of review by this Court.

4. The Commission also asserts (Pet. 13) that the court of appeals erred in ordering it to investigate and determine the propriety of the surcharge. In the abstract, the order seems to trench significantly on the ICC's discretion to review carriers' rates, but viewed in context, the decision represents

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apply to both situations does not mean that the factors that inform the court's decision to issue an injunction are the same. Disregard of a prior court order obviously creates a stronger basis for judicial action. See note 6, *infra*.

[6]The All Writs Act has been used in other contexts to forbid attempts by litigants to circumvent prior court orders. See, *e.g.*, *Cole* v. *United States*, 657 F. 2d 107, 109 (7th Cir. 1981); *Clinton* v. *United States*, 297 F. 2d 899, 906 (9th Cir. 1961), cert. denied, 369 U.S. 856 (1962); *Bullock* v. *United States*, 265 F. 2d 683, 691 (6th Cir.), cert. denied, 360 U.S. 909 (1959). See also *United States* v. *New York Telephone Co.*, 434 U.S. 159, 174 (1977).

[7]In this regard, we note that the earlier remand of the abandonment order in no way precludes the ICC from ordering abandonment of this line. The ICC still has that issue under consideration. Obviously, if abandonment is granted, this case is of no prospective significance, either to the railroad or the shippers. That is another reason why interlocutory review by this Court is not warranted.

an equitable solution to a difficult problem created largely by ICG's ostensible refusal to abide by the remand order in the abandonment case. The court of appeals presumably could have exercised its equitable power to forbid ICG from imposing any surcharge at all. But the court limited the intrusive effect of its order by allowing the surcharge to go into effect, so long as it complied with the statutory standards in the Staggers Rail Act of 1980, 49 U.S.C. (Supp. IV) 10705a(b). In order to assure compliance with the Staggers Rail Act, however, the court was forced to rely upon the Commission's expertise. Given the court's decision that it had jurisdiction to entertain this case, its decision to remand the case for further proceedings is a reasonable one and would certainly not warrant review independent of the All Writs Act issue.

Respectfully submitted.

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Solicitor General

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